Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1111

ROBERT MUSE, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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The petitioner, Robert Muse, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina, entered in the above entitled case on December 27, 1971.

### OPINION BELOW

The opinion of the Court of Appeals of North Caroline (Intermediate Appellate Court) is recorded at 11 N. C. App. 389. The opinion of the Supreme Court of North Carolina is recorded at 280 N. C. 31.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1971, and a copy thereof is appended to this Petition as Exhibit 1. The judgment of the Supreme

Court of North Carolina was entered on December 27, 1971, and a copy thereof is appended to this Petition as Exhibit 2. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

1. Did the Trial Court err in its voir dire findings and in allowing into evidence incriminating statements amounting to a confession of the petitioner when he was never advised of his Constitutional rights?

2. Did the confession of the petitioner emanate from mental coercion in the form of hope of reward?

## CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life; liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The petitioner was charged in a bill of indictment with breaking and entering a building occupied by City Motor Parts, Inc. of Elizabeth City, North Carolina, with larceny of personal property located therein, and with receiving stolen goods, knowing them to be stolen. The bill of indictment was returned in Pasquotank County; on Motion of the petitioner for a Change of Venue, the case was transferred to the Superior Court of Camden County for trial, and the petitioner was tried at the September 1970 Session of the Superior Court held in Camden County. The petitioner was tried only upon the felony of receiving stolen goods. He pleaded not guilty. From a verdict of guilty and judgment that the petitioner be confined in the State's prison for a term of not less than five (5) nor more than seven (7) years, the petitioner appealed to the Court of Appeals of North Carolina. The Court of Appeals of North Carolina ordered a new trial, copy of its opinion being appended hereto as Exhibit 1, as aforesaid. The Supreme Court of North Carolina allowed respondent's petition for writ of certiorari and reviewed the decision of the Court of Appeals of North Carolina and reversed the decision of the Court of Appeals of North Carolina. A copy of the opinion of the Supreme Court of North Carolina is appended hereto as Exhibit 2, as aforesaid.

The facts material to the consideration of the questions presented are concerned with the testimony

of O. L. Wise, an officer employed by the State Bureau of Investigation, and the voir dire findings and conclusions of the Trial Judge thereon, as hereinafter set forth from the record, pages 48 through 57 inclusive:

"My name is O. L. Wise. I am employed with the State Bureau of Investigation and I have been so employed since 1962. Subsequent to May 3, 1969 I had occasion to see and talk to the defendant, Robert Muse, in the Pasquotank County jail. Mr. Muse sent for me and in response to his request I went to the jail where I had a conversation with him.

OBJECTION.

BY THE COURT: Ladies and Gentlemen of the Jury, it is almost five o'clock. I am going to excuse the jury until 9:30 tomorrow morning. The Court will have to rule on the objection just made out of your presence. During the evening recess, and while you are away under no circumstances are you to discuss this case, or allow anyone to discuss it in your presence, and the Court impresses upon you it is necessary that your verdict be one that is arrived at impartially. You have not yet heard all of the evidence, or argument of counsel, and charge of the Court.

The Jury then left the Courtroom, and the following ensued in the absence of the Jury:

DIRECT EXAMINATION OF O. L. WISE BY SOLICITOR SMALL ON VOIR DIRE:

BY SOLICITOR SMALL:

Q. Mr. Wise, when you went to see Mr. Muse, will you tell us how the conversation was initiated?

A. Yes, sir.

Q. What date was this, please?

BY MR. BALL: OBJECTION.

BY THE COURT: Your OBJECTION is in the record, and I have not ruled. At this point I consider that all of what he is covering is under your OBJECTION.

O. L. WISE ON VOIR DIRE CONTINUES: It was on June 12, 1969 when I went to see Mr. Muse and this was when the conversation was initiated. I went to the jail, and the jailer let me in, and I walked back to the cell where Mr. Muse was incarcerated, and Mr. Muse told me that he was now in jail under a $5,000.00 bond, appearance bond; that he didn't understand why his bond was as high as it was; that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work; that he had a job in Virginia, and that if he could not get back to his job that his job would be terminated, and he asked me to contact the judge and see if he could get his bond reduced so that he could make bond and go to work. He asked me to contact Judge Horner, and I attempted to contact Judge Horner and he was not in town; he was out of the County holding court in the western part; I went back and told him this and told him that it was nothing I could do, and he told me—we continued to talk. He constantly stated to me that he did not understand why his bond was so high, and kept insisting that I help him to do something to get the bond lowered and he indicated to me that he did not break in and enter into the building; that he purchased the tools. I had several conferences with him between the dates of June 12 and July 15. I had numerous conferences with him.

He sent for me and after I could not contact Judge Horner I went back to jail and advised him that I could not contact Judge Horner. I told him then, he indicated he might have some information that would be of interest and value to

me in other cases and I told him at that time that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he could help me with I would appreciate it. He still wanted me to help assist in getting the bond lowered. I told him on numerous occasions that I was a police officer and that he knew I could not make him any promises, and that if he gave me any information in solving any cases that I would let it be known. He told me that he purchased tools from other people and he also told me that he has some information on a car that I was interested in. I did not interrogate him about the b eak-in nor did I initiate the discussions. He told me on numerous occasions he didn't break in the City Motor Parts. He did not tell me who he bought the tools from that he sold to Calvin Hudson. He said he paid $90 for them on one of these occasions in jail between June 12 and July 15. He might have told me when he purchased them but I don't know. I did not caution him of any of his constitutional rights other than mentioning that I was a police officer and that I could not promise him anything. I did not caution him of his constitutional rights because I didn't go to the jail to interrogate him about any particular thing. I went there at his request. He was in custody and he was under arrest and I knew that fact. The statements he gave me were voluntary on his part without prompting by me.

I did not request him to make a statement concerning the break-in at the City Motor Parts. On numerous occasions I told him if he had any information that would assist me in any investigation I would appreciate it. We talked about stolen vehicles and on one occasion I believe he told me he purchased the tools in his yard. I presume he volunteered the information, he called me and sent for me and I went down and talked to him

on a number of occasions. I went down and asked what he wanted and he related what facts he wanted to me. We talked about a number of things. I do not have notes of each of these conferences. Each time he would send for me and I would go down and he wanted to know if I had found out anything and I would tell him exactly. I have been down there on other occasions and he would give me certain portions of information on other things other than this, then I would go back down there and he would want to know if I had found out anything about that information. I made several trips down there to talk to him and all of these trips were a result of his request to see me. All of the information that he supplied me was volunteered by him when I responded to his request to go and see him. There were other people in the jail but none that I can remember participating in my conversation with him. He supplied me information relative to another type of crime of larceny and with information we ran down an automobile that had been found abandoned and burned, the motor removed and found the motor in an automobile. This was as a result of information he supplied me.

We talked about breaking and entering of Wood's Esso. He produced a new autombile inspection sticker and told me it came from Wood's Esso. He told me where he obtained it. He told me it was obtained during the course of a break-in and entering of Wood's Esso by some other person. He did tell me who he obtained it from. My conversation and questioning with the defendant was relative to obtaining information concerning these other crimes when I went to see him. It was during the course of these conversations that he related to me the fact that he had purchased the tools he had sold Mr. Hudson, from a third party, and that he had paid

$90 for them. I did not in any way solicit that information from him and had no knowledge it was coming until he told me. Thereafter I saw no need to caution him of his constitutional rights. I have known Mr. Muse for several years and I know him to be an intelligent man, as far as I know. I do not have any knowledge of his education. I know he is a steel tier doing construction work. I know he works on his own car some. I have seen him tinkering and working on it but to what extent I don't know.'

At the close of the voir dire hearing, the Trial Judge, inter alia, found: (lettering indicates portions excepted to and considered in the North Carolina Appellate Courts, Record Pages 53 through 57, inclusive)

"(7) No 'Miranda warning' was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. *C* Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. *D*

*E* (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. *F*

*G* (9) This was not a custodial interrogation, wherein the questioning was initiated by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. *H*

The Court then concluded:

> *M* (a) The statements made by the defendant on the occasions in question concerning the tools taken from City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. *N*
>
> *O* (b) The statements made by the defendant on the occasion in question do not fall within the prohibition of *Miranda* v. *Arizona*. *P*"

The petitioner's objection was overruled and Agent Wise then testified before the jury to substantially the same facts which he related on voir dire.

The questions sought to be reviewed were raised during the Trial by timely objections and exceptions and carried forward and argued in both the Court of Appeals and the Supreme Court of North Carolina. See Assignments of Error Nos. 6 through 15, Record pages 72 through 78, inclusive.

## REASONS FOR GRANTING THE WRIT

First, an analysis of the facts shows the following:

1. State Bureau of Investigation Agent, O. L. Wise, "had numerous conferences" with petitioner "between the days of June 12 and July 15", while petitioner was in jail.

2. Petitioner "didn't understand why his bond was as high as it was ($5,000.00); that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work; that he had a job in Virginia, and that if he could not get back to his job that his job would be terminated."

3. Petitioner asked Officer Wise "to contact the Judge and see if he could get his bond reduced so that he could make bond and go to work."

4. "He asked me to contact Judge Horner, and I attempted to contact Judge Horner and he was not in town; he was out of the County holding Court in the western part; I went back and told him (petitioner) this . . . we continued to talk."

5. Petitioner "constantly stated to me that he did not understand why his bond was so high, and kept insisting that I help him do something to get the bond lowered, and he indicated to me that he did not break in and enter into the building; that he purchased the tools."

6. Petitioner "sent for me and after I could not contact Judge Horner I went back to jail and advised him that I could not contact Judge Horner."

7. "I told him (petitioner) at that time that I was a police officer and naturally was interested in *any crimes* committed in the area or elswhere and *that anything of interest he could help me with I would appreciate it.*" (Emphasis added)

8. Petitioner "still wanted me to help assist in getting the bond lowered."

9. Officer Wise stated to petitioner "that if he gave me any information in solving any cases that I would let it be known."

10. Officer Wise "did not caution him (petitioner) of any of his constitutional rights."

11. Petitioner said he paid $90.00 for the stolen tools.

12. "On numerous occasions I (Officer Wise) told him (petitioner) if he had any information that would

assist me in *any investigation* I would appreciate it." (Emphasis added)

13. "On one occasion I believe he told me he purchased the tools in his yard."

14. "Each time he would send for me and I would go down and he wanted to know if I had found out anything and I would tell him exactly."

15. "My conversation and *questioning* with the petitioner was relative to obtaining information concerning these other crimes when I went to see him. (Emphasis added) It was during the course of these conversations that he related to me the fact that he had purchased the tools. It was during the course of these conversations that he related to me the fact that he had purchased the tools he had sold Mr. Hudson, from a third party, and that he had paid $90.00 for them."

16. "I have known Mr. Muse (petitioner) for several years."

The foregoing clearly shows that Officer Wise on numerous occasions visited petitioner in the jail; that petitioner was desperate to get his bond lowered; that Officer Wise assumed the role of an attorney and let the petitioner know that he, the officer, was seeking out the judge in order to render help; that Officer Wise was interested in any crimes committed in the area, *including the crime for which petitioner stood charged,* and that Officer Wise would appreciate it if the petitioner would supply him with information; that if petitioner gave Officer Wise any information in solving cases, including petitioner's case, that Officer Wise "would let it be known"; that Officer Wise did not caution petitioner of his constitutional

rights; that petitioner made a confession in this setting and under these circumstances; that the record in some ways reads like an attorney-client relationship between Officer Wise and the petitioner; that Officer Wise engaged in "*questioning*" the petitioner relative to other crimes; (Emphasis added) that during such "questioning" and expressions of gratitude on the part of Officer Wise if petitioner would give out any information, the petitioner gave out a confession; that petitioner and Officer Wise had known each other for several years, and the record reads as though they became close friends throughout a course of frequent visitation in the Pasquotank County jailhouse.

The prosecution may not use statements stemming from custodial interrogation of the petitioner unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination guaranteed by the Fifth Amendment of the Constitution of the United States. *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602.

It is well settled that the Fourteenth Amendment to the Constitution of the United States prohibits the use of coerced confessions in State prosecutions, whether the coercion is physical *or mental. Haynes* v. *Washington,* 376 U.S. 503, 10 L.Ed. 2d 513; *Thomas* v. *Arizona,* 356 U.S. 390, 2 L.Ed. 2d 863, re-hearing denied 357 U.S. 944, 2 L.Ed. 2d 1557; *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975.

What is interrogation? It is asking questions. Officer Wise admitted that he asked questions about other crimes and while doing so got a confession from the petitioner with regard to the crime for which he stood charged. Officer Wise admitted that he stated

to the prisoner that he, Officer Wise, would appreciate it if the prisoner would give him any information in solving *any cases*. This is interrogation. The petitioner, Robert Muse, did not rush into the police station shouting to Officer Wise that he wished to confess a crime. Officer Wise, assuming the role of attorney, questions the prisoner about other offenses and tells him that if he will give him any information about any offense, including the offense charged, that he, Officer Wise, will appreciate it. This is a shrewd method of interrogation, and the prosecution should not be allowed to escape the constitutional issue decided in *Miranda* in any such fashion as appears on this record.

Suppose Officer Wise had said to the petitioner: Will you give me information that will help me in solving this case? This would be custodial interrogation, and it is believed that the State of North Carolina would concede that it is. Instead of asking the question or questions in this indicated form, Officer Wise said this to the petitioner on numerous occasions: If you have any information that would assist me in any investigation I would appreciate it. ("On numerous occasions I told him if he had any information that would assist me in any investigation I would appreciate it. . . . that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he could help me with I would appreciate it . . . that if he gave me any information in solving any cases that I would let it be known." R., pp. 50 and 51) There is no difference between this method of inquiry or seeking out information than the clear cut grammatical question. Whether or not statements stem from custodial inter-

rogation certainly does not depend upon the grammar or semantics employed by the police officer. Otherwise, the procedural safeguards effective to secure the privilege against self-incrimination, enunciated in *Miranda,* would be effectively nullified. A question is a question from the standpoint of custodial interrogation even though the officer has shrewdly turned the question grammatically into an expression of gratitude if the prisoner will furnish him the information to solve the crime.

A confession is generally defined as "an acknowledgment in express words by the accused in a criminal case of the truth of the guilty fact charged or of some essential part of it." *State* v. *Hammer,* 240 N.C. 85, 81 S.E.2d 193 (1954), "It may be oral or written in whole or in part; and there is no requirement that an oral confession be reduced to writing . . ." *State* v. *Fox,* 277 N.C. 1 at 25 (1970). Any extra-judicial statement of an accused is a confession if it admits petitioner's guilt of an essential part of the offense charged. *State* v. *Hammer, supra.*

In the case at bar the petitioner was incarcerated in the Pasquotank County jail and on June 12, 1969 S.B.I. Officer O. L. Wise went to see him at the petitioner's request. The petitioner told him that he was in jail under a $5,000.00 bond; that he could not understand why his bond was so high and that he had a family which he could not support by being in jail and that HE COULD NOT EMPLOY COUNSEL unless he could get out of jail and go back to work. He said that he had a job in Virginia and that if he could not get back to his job that it would be terminated. The petitioner constantly requested of Officer Wise that he try to do something to get his bond lowered. There

were numerous conferences between Officer Wise and the petitioner between the dates of June 12 and July 15. (R. p. 50) Officer Wise at no time advised the petitioner of any of his constitutional rights but yet during these conferences with him extracted from him incriminating statements amounting to a confession of the particular crime which he was investigating.

Even though Officer Wise advised the petitioner that he could not make him any promises he told him that "if he gave me any information in solving any cases THAT I WOULD LET IT BE KNOWN." (R. pp. 50-51) The petitioner must have taken this expression to mean that if Mr. Wise let it be known that he was cooperating with the police in solving crimes in the area that maybe the court would be more lenient since Mr. Wise expressly said that he would "let it be known."

In *State* v. *Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (1967), a police officer while questioning a defendant in jail, said to the defendant: "That if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." The court there said that this statement by a person in authority was a promise which gave the defendant a hope for lighter punishment and that such a statement was one from which the defendant gather some hope of benefit by confessing. The court also said, "The total circumstances surrounding the defendant's confession impels the conclusion that there was aroused in him an 'emotion of hope' so as to render the confession involuntary."

The petitioner in our case told the officer that he could not employ counsel unless he was able to go back to his job. He expressed concern for the support of his family and under all of these circumstances he was apparently under mental and emotional pressure and

distress and not knowing his rights to an attorney sent for Officer Wise to help him. Officer Wise testified that the petitioner constantly stated to him that he did not understand why his bond was so high and kept insisting to him that he (Officer Wise) help him do something to get the bond lowered (R. p. 50). Officer Wise should have advised the petitioner of his rights to a court appointed attorney when he knew the petitioner was repeatedly asking him to perform "attorney-like" functions.

The trial court in its voir dire findings failed to make findings with respect to counsel and as to whether or not the petitioner indicated a desire to confer with an attorney. For the reasons set out in the above paragraph it is apparent that the petitioner did not know of his rights to a court appointed attorney as he kept asking Officer Wise for help and to do for him functions which an attorney would ordinarily and normally do for his client.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 at 726 (1966), the court said with reference to an individual who had been taken into custody by law enforcement officers: "HE MUST BE WARNED PRIOR TO ANY QUESTIONING that he has the right to remain silent, that anything he says can be used against him in a court of law, etc. . . . Opportunity to exercise these rights must be afforded to him throughout the interrogation. AFTER SUCH WARNINGS HAVE BEEN GIVEN, AND SUCH OPPORTUNITY AFFORDED HIM, THE INDIVIDUAL MAY KNOWINGLY AND INTELLIGENTLY WAIVE THESE RIGHTS and agree to answer questions or make a statement. BUT UNLESS AND UNTIL SUCH WARNINGS AND WAIVER ARE DEMONSTRATED BY THE PROSECUTION AT TRIAL, no evidence obtained as a result

of interrogation can be used against him." (Emphasis added)

Even though Officer Wise testified that he did not "interrogate" the petitioner about the break-in nor did he "initiate" the discussions (R. p. 51) and that on each occasion of their talks the petitioner sent for him, he did carry on several and numerous conversations with the petitioner and at different times and on different days by which he obtained from the petitioner incriminating statements about the crimes he was investigating and of which the petitioner was accused of committing.

The record affirmatively discloses that prior to the making of these incriminating statements the petitioner was never advised of his rights to remain silent or that he had the right to a court appointed attorney.

> "The United States Supreme Court, in the recent case of Miranda v. Arizona, has held that, under the rule requiring warnings as to the right to counsel and the right to be silent, as a prerequisite to the admissibility of any statements made by an individual held for interrogation by a law enforcement officer, no distinction can be drawn between statements which are direct confessions and statements which amount to admissions of part or all of an offense, nor between inculpatory statements and statements alleged to be merely exculpatory. The constitutional right to remain silent, and to counsel, precludes the use of incriminating statements elicited by the police during in custody interrogation UNLESS THE RIGHT IS INTELLIGENTLY WAIVED, AND NO WAIVER CAN BE PRESUMED if the defendant is not informed of his right to remain silent and his right to counsel." 29 AM. JUR. 2d, EVIDENCE, Sec. 614 (Emphasis added)

The State no doubt will try to show that the petitioner's statements were voluntary because he waived his rights to remain silent. In 21 AM. JUR. 2d, CRIMINAL LAW, Sec. 219, at p. 259, it is expressed:

> "Where a constitutional right accorded the accused is treated was waivable, it may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. It must be remembered, however, that a waiver is ordinarily an intentional relinquishment or abandonment OF A KNOWN RIGHT OR PRIVILEGE. THERE CAN BE NO WAIVER WHERE THE DEFENDANT DOES NOT KNOW HIS RIGHTS. And such relinquishment or abandonment must also be voluntary. MOREOVER, THE UNITED STATES SUPREME COURT HAS HELD THAT EVERY REASONABLE PRESUMPTION WILL BE INDULGED AGAINST THE WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS BY ONE CHARGED WITH CRIME." (Emphasis added)

"It is universally recognized that a confession of a person accused of crime may be admissible in evidence against the accused only if it was freely and voluntarily made, without duress, fear, or compulsion in its inducement AND WITH FULL KNOWLEDGE OF THE NATURE AND CONSEQUENCES OF THE CONFESSION. This rule applies to judicial, as well as to extrajudicial confessions." 29 AM. JUR. 2d, EVIDENCE, Sec. 529 at p. 580. (Emphasis added)

The petitioner in the case at bar even assuming that his statements were voluntary—which we contend were not—they were never made with any KNOWLEDGE OF THE CONSEQUENCES that they could or would be used against him in a court of law.

In *State* v. *Thorpe*, 274 N.C. 457, 164 S.E.2d 171 at 174 (1968), the court said, "If the accused is

without counsel, and is indigent, counsel must be provided by the authorities, or INTELLIGENTLY WAIVED." (Emphasis added)

It is strongly contended that at no time did the petitioner KNOWINGLY AND INTELLIGENTLY waive his right to counsel and to remain silent because he was never even AWARE of such rights. The burden should be heavier on the State when the petitioner makes incriminating statements especially when he was NEVER advised of his rights and this burden is justly on the State's shoulders as it establishes the isolated circumstances under which the petitioner engages into conversation with the police. There is nothing in the record to show that the petitioner did not want an attorney but in fact the contrary is impliedly shown when he said he could not afford one unless he could go back to his job. (See Findings of Fact No. 2, R. p. 54)

The case of *Carnley* v. *Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 at 77 (1962), presented the rule of law that, "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. ANYTHING LESS IS NOT A WAIVER." (Emphasis added)

In *U. S.* v. *Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966), a federal district court said, ". . . rights given by the Constitution are too fundamental and too precious for waiver lightly to be found. (Cites omitted) It is only where there is 'an intentional relinquishment or abandonment of a known right or privilege', *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461 (1938), that an effective

waiver can be found." In the *Blalock* case, three FBI agents encountered the defendant in a hotel lobby. The defendant, who was suspected of robbing a bank, was frisked by the agents after they identified themselves. Although they had no warrant, they accompanied the defendant to his room. When asked if he would consent to a search of his room, the defendant replied that he would not object. As a result of this consent search, money from the robbery was discovered and used as evidence at the defendant's trial but the evidence was later suppressed upon defendant's motion and a new trial granted. The facts of the *Blalock* case disclose that the agents failed to warn the defendant of his right to refuse a warrantless search and there was an absence of evidence that the defendant was aware of his right to do so under the Constitution. The court said that, "This constitutional right, like all others, may be waived by voluntary consent. In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved." . . . "First, the consent must have been 'intelligent'. Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, FOR AN INTELLIGENT CONSENT CAN ONLY EMBRACE THE WAIVER OF A 'KNOWN RIGHT' ". "CERTAINLY ONE CANNOT INTELLIGENTLY SURRENDER THAT WHICH HE DOES NOT KNOW HE HAS." (Cites omitted) (Emphasis added) *U. S.* v. *Blalock, supra.* The Court there indicated that the requirement of knowledge serves the purpose to prevent the possibility "that the ignorant may surrender their rights more readily than the shrewd." *U. S.* v. *Blalock, supra.*

It is contended that the court should look particularly at the circumstances surrounding the petitioner in determining whether or not his admissions were induced through artifice or deception and whether improper inducements such as "hope" was involved. There is no doubt that the admissions were not induced by physical force or fear such as torture, violence or threats of the person. These elements were not present but through the cunning concern and efforts and the revisits of Officer Wise at the request of the petitioner there were implied inducements of hope made when he mentioned that "if he gave me any information in solving any cases that I would let it be known". (R. pp. 50-51) Was this improper influence leading the petitioner to believe that he would be helped? Was this a confession obtained by pretending to solicit from the petitioner information concerning the commission of other crimes?

There was an overbearing of the will of the petitioner in a subtle like manner when Officer Wise continued to act under the guise of friendship which is obviously displayed in the record by his returning at each request of the petitioner to talk about his bond or "other crimes in the area", while at the same time acting in the role of one of the chief investigating officers of the case. His presence in these recurrent visits must have caused the petitioner to lower his guard and defenses and confess everything to the officer. The petitioner's statements were nothing other than a product of mental compulsion resulting from faith placed upon a police officer masquerading as a "friend" for the officer had known the petitioner for several years. (R. p. 52) Officer Wise's conversation and questioning of the petitioner was under the

guise of obtaining information concerning other crimes. (R. p. 52)

The court in *Watts* v. *Indiana,* 338 U S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, 1805, said, "There is torture of mind as well as of body; the will is as much affected by fear as by force".

The case at bar is not too unlike *State* v. *Gibson,* 2 N.C. App. 187, 162 S.E.2d 627 (1968), where the officer said he advised the defendant (a minor) that ". . . if he knew anything about this, if he would tell me, I would in any way assist him or help him as a youngster". Or *State* v. *Woodruff,* 259 N.C. 333, 130 S.E.2d 641 (1963), where the sheriff told the defendant ". . . that if he would help us with this thing, we certainly would try to help him"; and *State* v. *Fuqua, supra,* where the officer testified, "Yes, sir. I told him if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative". In these cases the court ruled that these statements constituted a type of promise which aroused in the defendant some ray of hope and were sufficient to render the confession involuntary. In our case Officer Wise testified that "I told him at that time that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he would supply me with that I would appreciate it". (R. p. 50) He also made the following statement (repeated here again for convenience of reader and emphasis): ('that if he gave me any information in solving any cases that I would let be known". These statements by Officer Wise aroused in the petitioner some ("hope" and this "emotion of hope" helped to induce the conferences and conversations and questioning which led to the petitioner's con-

fessions because the circumstances surrounding in-custody conversations and questioning can do doubt operate very quickly to overbear the will of a prisoner who has never been made aware of his rights because of the inherent coerciveness or intimidating atmosphere of confinement. The influence of the confinement of a jail should be a strong circumstance for the court to consider in determining whether or not the statements in question were voluntary and duly waived. The officer's role during these periods cannot be considered passive even though the petitioner called for him since the officer's efforts were focused upon solving the crime alleged to have been committed and the question of whether or not a confession is voluntary or involuntary should be determined upon these circumstances.

The court in *State* v. *Bishop,* 272 N.C. 283, 158 S.E.2d 511 at 517 (1968), stated "It is with pardonable pride that we note that for over one hundred forty years the rule enumerated in *State* v. *Roberts* (12 N.C. 259), *supra*, that 'a confession obtained by the SLIGHTEST EMOTIONS OF HOPE or fear ought to be rejected' has been an approved and applied rule of this court." (Emphasis added)

The petitioner here was not in familiar surroundings such as his home. He was isolated from friends and family. There was no attorney looking after his best interest and he was greatly concerned about the high bond placed upon him.

It is not contended that questioning of the petitioner while he is in custody by the police is prohibited either as a matter of law or due process WHEN he has been advised of the rights laid down in *Miranda* because the petitioner may waive effectuation of these rights

when he does so knowingly and intelligently. The lower court's conclusions of law as to the voluntariness of the confession are not supported by the facts as there is no evidence in the record which shows that the petitioner UNDERSTANDINGLY waived his rights. The petitioner could not have made his statements understandingly when he was never advised of his rights. In *United States* v. *Hucinich,* 404 F.2d 262 at 266 (1968), the court said that, "The gist of Miranda is that any statement of an accused while in custody is ipso facto involuntary unless he has been properly warned."

It is further contended that the lower court erred in failing to make findings of fact as to whether or not the right to counsel was intelligently and understandingly waived since the petitioner told Officer Wise that he could not employ counsel unless he could get out and attend to his job. The lower court failed to conclude as a matter of law that this right was knowingly, intelligently and understandably waived.

For the reason that the state never demonstrated that the petitioner knowingly and intelligently waived his privilege against self-incrimination since he was never advised of his rights, it is respectfully requested that a new trial be granted: See *State* v. *Mills,* 6 N.C. App. 347 at 353 (1969), where the court said, ". . . the state had to demonstrate compliance with two requirements before the confession, resulting from this in-custody interrogation, could be properly admitted into evidence. The first was that the defendant knowingly and intelligently waived his privilege against self-incrimination. The second was that this was done after the defendant had knowingly and intelligently waived his right to retained or appointed counsel."

The holding of the Supreme Court of North Carolina in petitioner's case does not seem consistent with its holding in *State* v. *Blackmon,* 280 N.C. 42, filed the same day, where the Supreme Court of North Carolina quoted from *Miranda* as follows:

> " 'The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who must require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end . . .
>
> " 'An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given . . .
>
> " 'An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . .

> "'After such warnings have been given, and such opportunity accorded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.'"

The United States Supreme Court in *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967), said:

> ". . . (B)efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt".

Admission, over objection, of evidence obtained in violation of a right guaranteed the defendant by the Constitution of the United States can be harmless error, if, but only if, the court can declare there is no reasonable possibility that such evidence contributed to the conviction. *Chapman* v. *California, supra; Fahy* v. *Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171.

It is clear that the evidence objected to in petitioner's case contributed to his conviction and thus cannot be harmless error.

Copy of Order marked Exhibit 3 appended hereto appointing the undersigned as counsel for indigent Petitioner.

## CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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